

## **AGREEMENT CONCERNING COLORADO RIVER DROUGHT CONTINGENCY MANAGEMENT AND OPERATIONS**

This Agreement Concerning Colorado River Drought Contingency Management and Operations ("Companion Agreement") is entered into this \_\_\_\_ day of \_\_\_\_\_, 201\_\_ by and among [INSERT PARTIES TO THE UB AND LB DCPs]

### **RECITALS**

#### **A. Background**

1. Federal law and practice (including, but not limited to, Section 16 of the Boulder Canyon Project Act, 43 U.S.C § 6170 and Section 602(b) of the 1968 Colorado River Basin Project Act, 43 U.S.C. § 1552(b), the Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act, and the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead ("2007 Interim Guidelines")) contemplate that in the operation of Lakes Powell and Mead, the Secretary of the Interior ("Secretary") consults with the Colorado River Basin States and such state representatives as each Governor may designate. Through this law and practice, the Governors' representatives and state agencies have in the past reached agreements among themselves and with the Secretary on various aspects of Colorado River reservoir operation. This Companion Agreement is entered into in furtherance of this law and practice.
2. The signatories to the April 23, 2007, Agreement Concerning Colorado River Management and Operations ("2007 Seven States' Agreement") intended to improve cooperation and communication among them; provide additional security and certainty in the water supply of the Colorado River System for the benefit of the people served by water from the Colorado River System; and avoid circumstances which could otherwise form the basis for claims or controversies over interpretation or implementation of the Colorado River Compact and other applicable provisions of the Law of the River.<sup>1</sup>
3. The signatories to the 2007 Seven States' Agreement subsequently submitted to the Secretary a recommendation ("States' Recommendation") for operation of the Colorado River System, including proposed guidelines to be incorporated in a record of decision at the conclusion of a decision-making process pursuant to the National

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<sup>1</sup> The "Law of the River" as mentioned in this Companion Agreement refers to the body of law existing on the date of this Companion Agreement and affecting the interstate and international use, management, and allocation of water in the Colorado River System, including the 1922 Colorado River Compact, the Mexican Water Treaty of 1944, the 1948 Upper Colorado River Basin Compact, several United States Supreme Court decisions, the Consolidated Decree of the Supreme Court in *Arizona v. California*, and a host of federal laws and administrative regulations.

Environmental Policy Act, 42 U.S.C. §§ 4321 through 4347.

4. On December 13, 2007, the Secretary adopted a record of decision, based in large part on the States' Recommendation, entitled the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, effective through December 31, 2025 (through preparation of the 2026 Annual Operating Plan) ("Interim Period").
5. Consistent with and pursuant to provisions in the 2007 Seven States' Agreement and the 2007 Interim Guidelines, the Parties have regularly consulted regarding various issues that have arisen prior to and during implementation of the 2007 Interim Guidelines.
6. Based on the actual operating experience gained after the adoption of the 2007 Interim Guidelines and emerging scientific information regarding the increasing variability and anticipated decline in Colorado River flow volumes, the Parties recognize and acknowledge that those relying on water from the Colorado River System face increased individual and collective risk of temporary or prolonged interruptions in water supplies, with associated adverse impacts on the society, environment, and economy of the Colorado River Basin. Therefore, the Parties have agreed that it is necessary and beneficial to pursue additional actions beyond those contemplated in the 2007 Interim Guidelines to reduce the likelihood of reaching critical elevation levels in Lake Powell and Lake Mead through the Interim Period.
7. The Parties have developed two drought contingency plans: the Upper Basin Drought Contingency Plan ("Upper Basin DCP"), which affects operations above Lee Ferry, and the Lower Basin Drought Contingency Plan ("Lower Basin DCP"), which affects operations below Lee Ferry. Both the Upper Basin DCP and the Lower Basin DCP are supplemental to and in furtherance of the goals of the 2007 Interim Guidelines.
8. Beginning in 2008, the Parties began discussions with the International Boundary and Water Commission ("IBWC") and representatives of Mexico regarding potential cooperative actions in the Colorado River Basin pursuant to the United States-Mexico Treaty on Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande ("1944 Water Treaty"), culminating in several agreements ("Minutes") designed to implement the Treaty terms.
9. From 2015 through 2017, the Parties participated in negotiations with the IBWC and representatives of Mexico on Minute 323 to the 1944 Water Treaty, titled Extension of Cooperative Measures and Adoption of a Binational Water Scarcity Contingency Plan in the Colorado River Basin.
10. Minute 323, approved on September 27, 2017, includes a Binational Water Scarcity Contingency Plan for Mexico to participate in the equivalent of drought contingency

plan if a Lower Basin Drought Contingency Plan is put into effect in the United States. The Binational Water Scarcity Contingency Plan is intended to allow Mexico to undertake water savings in parity with U.S. savings for drought contingencies which would be recoverable under specifically improved reservoir conditions.

B. Purpose

The Parties intend that the actions contemplated in and recognized by this Companion Agreement will allow the development and testing, on an interim basis, of tools to provide additional security and certainty in the water supply of the Colorado River System for the benefit of the people served by the System and to avoid circumstances which could otherwise form the basis for claims or controversies over interpretation or implementation of the Colorado River Compact and other applicable provisions of the Law of the River.

**AGREEMENT**

In consideration of the above recitals and the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

A. Support for the Upper Basin DCP

For purposes of this Companion Agreement, the Upper Basin DCP includes the Agreement for Drought Response Operations at the Initial Units of the Colorado River Storage Project Act and the Agreement Regarding Storage at Colorado River Storage Project Act Reservoirs Under an Upper Basin Demand Management Program (“Demand Management Storage Agreement”) which are attached and incorporated herein as Attachments A1 and A2. The Parties agree that, when executed, the additional agreement(s) specified in Section III.B.3.b of the Demand Management Storage Agreement shall constitute additional components of the Upper Basin DCP. The Parties agree that the components of the Upper Basin DCP are likely to have a beneficial effect on the management of the Colorado River System. The Parties further agree to support steps necessary to achieve final adoption and implementation of the Upper Basin DCP.

B. Support for the Lower Basin DCP

The Lower Basin DCP, entitled Lower Basin Drought Contingency Plan Agreement (including Exhibit 1 entitled Lower Basin Drought Contingency Operations), is attached and incorporated herein as Attachment B. The Parties agree that the components of the Lower Basin DCP are likely to have a beneficial effect on the management of the Colorado River System. The Parties further agree to support steps necessary to achieve final adoption and implementation of the Lower Basin DCP.

C. Federal Legislation

Pursuant to Paragraph B of the Agreement Regarding Notice From the Secretary of the Interior for the Purpose of Implementing Section IV of Minute 323, the non-Federal Parties have worked through a consensus-based effort to develop and seek federal legislation to implement the Upper Basin and Lower Basin DCPs. The legislation developed by the non-Federal Parties is attached hereto as Attachment C.

D. Resolution of Claims or Controversies Related to the Upper Basin DCP or the Lower Basin DCP

Consistent with the purpose of this Companion Agreement, the Parties agree to pursue a consultative approach to resolution of any potential claim or controversy arising under or related to this Companion Agreement, the Upper Basin or Lower Basin DCPs, or the associated federal legislation. In the event any Party becomes concerned that there may be a claim or controversy under this Companion Agreement, the Upper Basin or Lower Basin DCPs, or the associated federal legislation, such Party shall notify all other Parties in writing, and the Parties shall meet in good faith in order to resolve such claim or controversy by mutual agreement. Further, the non-Federal Parties agree that before initiating any judicial or administrative proceeding against any other Party, no claim thereunder shall be ripe until such dispute resolution process set forth in this Paragraph D has been completed. All non-Federal Parties shall comply with any request by the Secretary for consultation in order to resolve any claim or controversy. Notwithstanding anything in this Companion Agreement to the contrary, the terms of this Paragraph shall survive the termination or expiration of this Companion Agreement.

E. Implementation and Enforcement

The Parties acknowledge and agree that implementation and operation of the Upper Basin and Lower Basin DCPs consistent with this Companion Agreement are intended to further the goals and coordinated operations of Lake Powell and Lake Mead pursuant to the 2007 Interim Guidelines, and to enhance conservation of water in the Colorado River System for the benefit of each of the Colorado River Basin States.

The Secretary shall provide and describe 24-Month Study assumptions and projected operations, including those related to Lower Basin water use, to the Parties prior to the completion of the April and August 24-Month Studies under the 2007 Interim Guidelines. In addition to the consultations under the Annual Operating Plan, the Secretary shall also provide and describe to the Parties an evaluation of actual calendar-year operations and identify any substantial variations from modeling assumptions.

The Parties agree to comply with this Companion Agreement, including the Upper Basin and Lower Basin DCPs. The Parties agree to act in good faith and with fair dealing entering into, implementing and performing their obligations under this Companion Agreement, including the Upper Basin and Lower Basin DCPs. In the event of failure to comply with this provision, any affected non-Federal party may maintain an action to enforce pursuant to 43 U.S.C. §1551(c).

F. Past Consultation

Consistent with the 2007 Interim Guidelines and the 2007 Seven States' Agreement, and consistent with the recent history of collaboration on the Colorado River to address and avoid circumstances that could form the basis for claims or controversies, consultation on the terms and application of this Companion Agreement and the Upper Basin and Lower Basin DCPs, has occurred between the Governors' Representatives, Colorado River Basin States and the Secretary of the Interior. Such consultation was limited to the terms of this Companion Agreement and the Upper Basin and Lower Basin DCPs, and was not for the purpose of the Secretary's formal review required in Section XI.G.7.D of the 2007 Interim Guidelines.

G. Consultation on Operations

Any Party may request consultation with the other Parties on implementation or operation of this Companion Agreement including the Upper Basin and Lower Basin DCPs. Upon such request, the Parties shall consult in good faith with each other to address questions, concerns or issues that may arise regarding implementation or operation of this Companion Agreement including the Upper Basin and Lower Basin DCPs.

H. Consultation Regarding Future Implementation

The Demand Management Storage Agreement contemplates certain future actions under specified conditions. Because the implementation of an Upper Basin Demand Management Program would relate to interests, rights and obligations regarding the Colorado River, the Parties agree to work together to seek consensus in finalizing an Upper Basin Demand Management Program. Specifically, the Upper Division States and the Secretary agree to consult with the Lower Division States regarding the following:

1. Verification of and accounting for the actual volume of conserved consumptive use, including consideration of water uses that may be eligible for designation as conserved consumptive use under a Demand Management Program, prior to reaching consensus on the feasibility thereof;
2. The methodology, process and documentation for verification of and accounting for the actual volume of conserved consumptive use considered during the Program Development stage prior to entering into any of the agreement(s) identified in Section III.B.3.b of the Demand Management Storage Agreement; and
3. Annual verification by the Upper Division States, through the Commission, and the Secretary of the volume of conserved water created, conveyed, and stored at the CRSPA Initial Units as set forth in Section III.A.4, III.A.11, and III.B.2.b.vi of the Demand Management Storage Agreement.

I. Consultation on Amendments or Modifications

No substantive amendment or modification of the Companion Agreement shall be made

without the written consent of the Parties.

No substantive amendment or modification to the Upper Basin and Lower Basin DCPs shall be made without prior consultation among the Parties. If a Party requests consultation for amendments or modifications pursuant to this Paragraph, the Parties shall consult in good faith to assess and consider suggested amendments or modifications.

Notwithstanding the above provisions, no amendments or modifications to this Companion Agreement or the Upper Basin and Lower Basin DCPs shall be made without a subsequent act of Congress if such amendments or modifications would conflict with the Colorado River Compact, the Boulder Canyon Project Act, the Upper Colorado River Basin Compact, the 1944 Water Treaty, the Consolidated Decree of the Supreme Court in *Arizona v. California*, the Colorado River Storage Project Act or the Colorado River Basin Project Act.

J. Reservation of Rights

Notwithstanding the terms of this Companion Agreement, including the Upper Basin and Lower Basin DCPs, in the event that for any reason the Parties cannot reach consensus on any matter after the processes set forth in this Companion Agreement have been satisfied, the Parties reserve, and shall not be deemed to have waived, any and all rights, including any claims or defenses, they may have as of the date hereof or as may accrue after the term hereof, under any existing federal or state law or administrative rule, regulation or guideline, including without limitation the Colorado River Compact, the Boulder Canyon Project Act, the Upper Colorado River Basin Compact, the 1944 Water Treaty, the Consolidated Decree of the Supreme Court in *Arizona v. California*, the Colorado River Storage Project Act, the Colorado River Basin Project Act and any other applicable provision of federal law, rule, regulation, or guideline.

Nothing in this Companion Agreement, including the Upper Basin and Lower Basin DCPs, or any related or enabling legislation referenced in Paragraph C of this Companion Agreement shall be utilized against any other Party in any administrative, judicial or other proceeding, except for the sole purpose of enforcing the terms of this Companion Agreement, including the Upper Basin and Lower Basin DCPs. Notwithstanding anything in this Companion Agreement to the contrary, the terms of this Paragraph shall survive the termination or expiration of this Companion Agreement.

K. No Precedent/Reaffirmation of Existing Law

Except as provided in Section II of the Demand Management Storage Agreement, the Parties represent and agree, that nothing in this Companion Agreement, including the Upper Basin and Lower Basin DCPs, or any related or enabling legislation referenced in Paragraph C of this Companion Agreement, shall be interpreted or construed as establishing a precedent for employing the operational tools contemplated by the Upper Basin or Lower Basin DCPs and any related federal legislative approval beyond the terms of the Upper Basin and Lower Basin DCPs. The Parties hereby affirm the entitlement and right of each State under such existing law to use

and develop the water of the Colorado River System. Notwithstanding anything in this Companion Agreement to the contrary, this Paragraph shall survive the termination or expiration of this Companion Agreement.

L. Scope

The Parties represent and agree that actions to be employed under the Upper Basin DCP are limited to Colorado River operations above Lee Ferry, and actions to be employed under the Lower Basin DCP are limited to Colorado River operations below Lee Ferry.

M. Term

This Companion Agreement shall be effective as of the date that all Parties have executed this Companion Agreement. Unless earlier termination is agreed to, in writing, by all Parties, this Companion Agreement shall be effective through the Interim Period, unless otherwise specified in this Companion Agreement, including the Upper Basin and Lower Basin DCPs.

N. Representations and Warranties

Each Party warrants and represents to each of the other Parties, as a material inducement to enter into this Companion Agreement, the following:

1. The Party has all legal power and authority to enter into this Companion Agreement and to perform its obligations hereunder on the terms set forth in this Companion Agreement, and the execution and delivery hereof by each Party and the performance by each Party of its obligations hereunder shall not violate or constitute an event of default under the terms or provisions of any agreement, document, or instrument to which each of the Parties is a Party or by which each Party is bound.
2. The individual executing this Companion Agreement on behalf of the Party has the full power and authority to bind the Party he or she represents to the terms of this Companion Agreement.
3. This Companion Agreement constitutes a valid and binding agreement of each Party, enforceable against each Party in accordance with its terms.

O. No Third-Party Beneficiaries

This Companion Agreement and any agreements made or actions taken pursuant hereto are made solely for the benefit of the Parties. No Party to this Companion Agreement intends for this Companion Agreement to confer any benefit upon any person or entity not a signatory upon a theory of third-party beneficiary or otherwise.

P. The Parties are hereby notified of A.R.S. section 38-511.

Q. Governing Law

This Companion Agreement shall be interpreted, governed by, and construed under applicable Federal law.

R. Actual Operating Experience

Adoption of this Companion Agreement does not preclude exploration of additional approaches for operational flexibility in light of actual operating experience.

S. Uncontrollable Forces

No Party shall be considered to be in default in the performance of any of its obligations under this Companion Agreement when a failure of performance shall be due to any cause beyond the control of the Party affected, including but not limited to, facilities failure, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority which by exercise of due diligence and foresight such Party could not have reasonably expected to avoid. A Party rendered unable to fulfill any of its obligations under this Companion Agreement by reason of an Uncontrollable Force shall give prompt written notice of such Uncontrollable Force to the other Parties and shall exercise due diligence to remove such inability with all reasonable dispatch.

T. Successors and Assigns

The provisions of this Companion Agreement shall apply to and bind the successors and assigns of the Parties, but no assignment or transfer of this Companion Agreement or any right or interest herein shall be valid until consented to in writing by all Parties, which consent shall not be unreasonably withheld.

U. Drafting Considerations

Each Party and its counsel have participated fully in the drafting, review, and revision of this Companion Agreement, each of whom is sophisticated in the matters to which this Companion Agreement pertains, and no one Party shall be considered to have drafted this Companion Agreement.

V. Notices

All notices and requests required or allowed under the terms of this Companion Agreement shall be in writing and shall be sent via electronic mail and mailed first class postage paid to

the following entities at the following addresses:

[INSERT CONTACT INFORMATION:]

A Party may change its address by giving the other Parties notice of the change in writing.

W. Joint Defense Against Third-Party Claims

The Parties have certain common, closely parallel, or identical interests in supporting, preserving, and defending this Companion Agreement. The nature of this interest and the relationship among the Parties present common legal and factual issues and a mutuality of interests. Because of these common interests, the Parties will mutually benefit from an exchange of information relating to the support, preservation, and defense of this Companion Agreement, as well as from the coordinated investigation and preparation for discussion of such interests. In furtherance thereof, in the event of any challenge by a third party to this Companion Agreement, the Parties will proceed with reasonable diligence and use best efforts to support and defend the Companion Agreement in any lawsuit or administrative proceeding challenging the legality, validity or enforceability of any term of this Companion Agreement, and will, to the extent appropriate, enter into joint defense or common interest agreements. Each Party will bear its own costs of participating in the defense of this Companion Agreement under this Paragraph.

X. Counterparts

This Companion Agreement may be executed in counterparts, each of which shall be an original and all of which, together, shall constitute only one Companion Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Companion Agreement on the day and year written above.

[Signatures begin on following page.]